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ABSTRACT

This speech discusses the legality of school committee severance and salary adjustment payments based on accumulated and unused sick leave to retired teachers in the last year of service. The types of contract provisions discussed usually invoke a formula by which a certain number of accumulated, unused sick leave days are multiplied by a per diem rate to determine a lump sum allocated on retirement. The author cites and analyzes several labor cases that support the legality of severance pay and suggests that several aspects of severance pay provisions be drafted with care. (JF)

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SEVERANCE PAY FOR PUBLIC SCHOOL TEACHERS

by Jeffrey M. Freedman

The subject matter of my remarks today is the legality of school committees' payments to retiring teachers of severance pay and salary adjustments in the last year of service based upon accumulated and unused sick leave. My expertise in this area, such as it is, derives from the fact that I successfully represented the petitioners in the case of Fitchburg Teachers Association v. City of Fitchburg, '71 Mass. Adv. Sh. 1253, 271 N.E. 2d 646, (Massachusetts Supreme Judicial Court, July, 1971). It should be noted at the outset that I represent teachers and, for that reason, may not qualify as an objective, unbiased analyst.

There are several commonly used contract provisions converting accumulated and unused sick leave into a cash payment at retirement. These clauses are often known as "severance payments", "retirement allowances", "termination pay", or "salary adjustments in the last year of service before retirement." Frequently, there is no substantive difference between these provisions. Most of these clauses invoke a formula by which a certain number of accumulated, unused sick leave days are multiplied by a per diem rate to determine a lump sum payment upon retirement. Usually payment is made to the retiring teacher at the close of school in June, after the total sick leave days have been computed. "Severance pay" sounds like a fringe benefit, as contrasted with a "salary adjustment in the last year before retirement" which purports to be additional, regular compensation. It is suggested, however, that the difference is generally one of semantics only and not of substance.

The collective bargaining contract between the school committee and the teachers association in the Fitchburg case contained a provision calling for a salary adjustment in the last year of service before retirement which read as

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follows: "For every day of attendance in excess of 170 days in each year of service to the Fitchburg School System, a credit of one-twentieth (1/20) of one percent (1%) of the final year's salary shall be granted as a salary adjustment for a teacher's final year of service before retirement." When eight teachers retired in June, 1969 under circumstances entitling them to a salary adjustment based upon accumulated and unused sick leave, the city auditor refused to approve the vouchers submitted by the superintendent on the ground that such payments constituted a gift. A petition for declaratory judgment was brought by the local teachers association and the retiring teachers to determine the legality of the provision and to order payment of the appropriate sums.

The trial court ruled that a salary adjustment in the last year of service before retirement was not a gift. However, the judge dismissed the petition on the ground that there was no specific appropriation by the city to pay the additional salaries. The teachers appealed.

The Massachusetts Supreme Judicial Court held that the contract provision was valid. The Court's reasoning was based primarily upon an early statute[1] giving school committees the power to contract with public school teachers and secondarily upon a later statute[2] authorizing school committees and teacher associations to bargain collectively over "wages, hours and other conditions of employment." The Court viewed the power to pay a salary adjustment in the last year of service before retirement as a part of the "complete and exclusive nature of the authority to contract [which] has long been established" in Massachusetts and as "a valid exercise by the committee of its power to set wages." The Court also reversed the lower court on the appropriations issue.

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1. M.G.L.A., C. 71, § 38.

2. M.G.L.A., C. 149, § 178I.

The Court held that there was no necessity for a specific municipal appropriation to pay the additional salaries. The money should have been paid if there were any unexpended funds within the school committee's entire budget as of the date of the teachers' retirement.

The primary thrust of the city's gift argument was the fact that unused sick leave days accumulated in years prior to the inclusion of the salary adjustment provision in the contract were being compensated at retirement. That is, while the provision was first included in the contract in January, 1969, teachers who retired in June, 1969 now were insisting upon payment for unused and accumulated sick leave days "banked" in years prior to 1969. It was argued that the city was paying twice for services rendered and was doing so retroactively.

The Court handled this problem neatly:

> "We need not decide whether the fact that the salary adjustment is based in part on services performed before the effective date of the amendment makes it lacking in consideration when viewed in isolation, for it should properly be considered only as part of the entire quid pro quo of the contract."

Moreover, it is suggested that it was unrealistic of the city to emphasize the case of the individual teacher who retired shortly after the effective date of the new clause. The salary adjustment provision was part of the collective bargaining contract covering several hundred teachers. Many teachers had no sick leave accumulated at the effective date and whether they will be paid a salary adjustment in their last year of service will depend entirely on their post-contract conduct. The association bargained for all teachers and sought agreement on a rule of general application. The induced response of the group as a whole, in terms of post-contract employment performance, was sufficient to prevent characterization of this plan as

a gratuity. The salary adjustment provision cannot be treated in isolation from the whole economic package negotiated by the association. Assumedly the impact of this provision was considered by the negotiating parties in determining the entire economic effect of the contract. Finally, the eight teachers who retired in June, 1969 worked from January through June, 1969 and their six months performance should be legally sufficient under the traditional "peppercorn" notion of consideration.

The Massachusetts collective bargaining statute mandates that representatives of the municipal employer and employees shall "confer in good faith with respect to wages, hours and other conditions of employment," and in this respect parallels Sections 8 (d) and 9 (a) of the National Labor Relations Act (29 U.S.C. 158 (d) and 159 (a)). It must be presumed that the legislature, by incorporation into the statute the same terminology as contained in the NLRA, intended likewise to adopt the construction of those words as interpreted by the federal courts.

The threshold case concerning the definition of wages under the NLRA appeared in Inland Steel Co. v. NLRB, 170 F. 2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960 (1949). In that case the court quoted with approval the following statement of the NLRB.

> "With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term 'wages' as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. . . . Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in wage structure is effected." Inland Steel, supra at 251.

The court went on to find that the company's pledge to pay certain specified monetary benefits upon the employees reaching a designated age formed a part of the consideration for the work performed and the court stated it could see no reason why an employee entitled to the benefit of the plan could not, upon refusal of the company to pay, sue and recover such benefits.

> "In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services." Inland Steel, supra at 253.

The court stated that the term "wages" was not to remain static but rather the general language was designed to meet the increasing problems arising from the employer-employee relationship.

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that the evil has theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. [Citing Weems v. United States, 217 U.S. 349, 373, 54 L. Ed. 793 (1910)]" Inland Steel, supra at 254.

W. W. Cross & Company, Inc. v. NLRB, 174 F. 2d 875 (1st Cir. 1949) soon followed the Inland Steel decision and held that the word "wages" included a group insurance program. Judge Woodbury relied on Inland Steel to refute the company's contention that the legislative history of the statute showed Congress had not intended that the language of the statute should include welfare benefits such as health and accident insurance. Instead, the court ruled that Congress intended to impose upon employers the duty to bargain collectively with their employees' representatives with respect to any matter which might in the future emerge as a bone of contention between them, pro-

vided it should be a matter "in respect to rates of pay, wages, hours of employment."

The court concluded, at 878, with this definition:

> ". . . [I]t can safely be said that the word 'wages' in § 9 (a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." (Emphasis added.)

After Cross, the NLRB and the courts quickly expanded and amplified the term. See Weyerhaeuser Timber, 25 L.R.R.M. 1163, 87 N.L.R.B. 672 (1949), meals at sawmill held to be "wages"; NLRB v. Bemis Bros. Bag Co., 206 F. 2d 33 (5th Cir. 1953), housing units were rented for less than fair rental value by employer and court held that the rentals were "wages" and bargainable; Central Illinois Public Service Co., 51 L.R.R.M. 1508, 139 N.L.R.B. 1407 (1962) (aff'd 324 F. 2d 916) (7th Cir. 1963), gas discounts; NLRB v. Niles-Bement-Pond Co., 199 F. 2d 713 (2d Cir. 1952), Christmas bonus.

Clearly, the unbroken and expansive interpretation placed on the term "wages" by the NLRB and federal courts supports the legality of severance pay provisions where the language of the municipal bargaining statute is identical to that of the NLRA.

The Fitchburg opinion is consistent with cases in other states which have held uniformly that payments for accumulated and unused sick leave are valid. In Purdie v. Jarrett, 222 Geo. 795, 152 S.E. 2d 749 (1966) the Georgia Supreme Court held that a lump sum payment at retirement based upon accumulated sick leave constituted "earnings" and that the payment should be included in the computation of the teacher's average five year salary for purposes of the pension system. Implicit in the Court's decision was the view that payment for accumulated sick leave pursuant to the rules of the pension board was legal.

> "Clearly, the unused sick leave pay is compensation for services rendered the board of education. It is payment for services rendered because the employee was not absent due to illness. By not taking sick leave, the employee has increased her value to the board of education and the payment to compensate her is merely a part of her total salary or compensation for the period of her employment." Purdie v. Jarrett, 222 Ga. 795, 152 S.E. 2d 749, 751 (1966).

In Pohle v. Christian, 21 Cal. 2d 83, 130 P. 2d 417 (1942) the California Supreme Court held that pursuant to the rules of the California Personnel Board a civil service employee was entitled to be paid for unused vacation time when he was "separated" from the service.

In City of Orange v. Chance, 325 S.W. 2d 838 (1959) the Texas Court of Civil Appeals held that under the applicable statute policemen and firemen who left the city's classified service for any reason were entitled to payment for accumulated sick leave and that such payments did not violate a "no extra compensation after completion of services" prohibition in the constitution. The court considered the payments to be part of the employee's "overall" compensation. The fact that a part of the compensation was called "sick leave" was of no effect.

> "We believe a provision of this kind would tend to keep employees regularly on the job whereas a construction condemning the severance payment as a 'gratuity' would tend to encourage absenteeism." City of Orange, supra at 841.

Another recent affirmation of the legality of severance pay provisions is found in Providence Teachers Union, Local 958 v. School Committee of City of Providence, 276 A. 2d 762, 766 (R.I. Supreme Court, April 23, 1971) where the Court said:

> "We see nothing in the nature of a gratuity with the award in the controversy. Any teachers who have managed to remain in comparatively good health during their 35 years of toil in the educational vineyards of any muni-

> cipality and might be eligible for some of the benefits described in section 3-22 are not getting something for nothing. This clause serves a useful function in the educational scheme. This provision calling for the payment of accumulated sick leave after 35 years of service acts as an inducement to teachers to remain in the school system and deters absenteeism for trifling ailments. [Citations omitted] It acts as an aid in seeking to insure that the pupils might have a continuity of teaching techniques in their classrooms throughout the school year. Such a clause might save the school administration much toil and trouble as it seeks to obtain the services of a substitute to cover for the regular teacher who, after deciding his 'sniffles' are a portent of the flu, takes advantage of some of his unused sick leave."

In June, 1970, the Appellate Division of the New York Supreme Court held that payment of accumulated and unused sick leave upon a teacher's death, pursuant to a provision in a collective bargaining contract was valid. See Teachers Association Central High School District #3 v. Board of Education, 312 N.Y.S. 2d 252 (1970).

From the view point of public policy, sick leave conversion plans are intended (1) to reduce employee absences, (2) to curb or eliminate abuses of sick leave, (3) to provide efficient manpower usage, and (4) to reward faithful employees. It is a fact that sick leave is universally accepted by both government and private industry as an essential fringe benefit to attract and retain competent workers.[3] Conversion of unused sick leave is merely an extension of sick leave itself.[4]

Finally, I suggest that there are several aspects of severance pay provisions which sould be drafted with care. First, the so-called "vesting"

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3. Averell v. Newburyport, 241 Mass. 333.

4. See Severance Pay for Professional Employees in Public Schools, pp. 5-14, Educational Research Service Circular #5, 1201 Sixteenth Street, N.W., Washington, D.C.

requirement, the event which causes severance pay to be owed, should be explicit. For example, "retirement" may not be sufficient to exclude short term service where the parties really mean retirement after 20 years of service at age 55 or at an age which dove-tails with applicable teacher or municipal retirement systems. Similarly, contingencies such as dismissal and death should be covered. Second, in order to avoid open-ended municipal liability, the amount of money should be limited by an ascertainable standard; that is, there should be a specific maximum number of days at a specific per diem rate. A provision which rewards all unused sick leave at an undetermined rate may fail for reasons of vagueness or unreasonableness.